

05-559 OCT 28 2005

No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

MARTIN CHAMBERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DONALD M. RÉ
Counsel of Record

DONALD M. RÉ
A Professional Law Corporation

624 South Grand Avenue, 22nd Floor
Los Angeles, California 90017
(213) 623-4234

Attorney for Petitioner
MARTIN CHAMBERS

QUESTION PRESENTED

1. Whether the harsh, unique, and severely criticized “initial brief” rule of the Eleventh Circuit, which bars consideration of any issue not raised in an appellant’s initial brief, deprived petitioner, and many other similarly situated criminal appellants, of due process of law, and their right to raise the illegality of their sentence under *United States v. Booker*, 543 U.S. ____ (2005), because both *Booker* and *Blakely v. Washington*, 542 U.S. ____ (2004) were decided *after* the filing of the Opening Brief?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This is a Petition for Writ of Certiorari brought to review the unpublished Memorandum of the United States Court of Appeals for the Eleventh Circuit filed June 24, 2005, which affirmed Petitioner's conviction for violation of Title 18 U.S.C. §§1956(h) and 1956(a)(3)(B), and refused to consider Petitioner's claims of error under *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004) and *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005).

Chambers' initial brief was filed April 14, 2004, approximately two months before this Court's decision in *Blakely*. Petitioner made timely and repeated efforts to have the illegality of his sentence under *Blakely* considered by the court, all of which were rejected by the Eleventh Circuit. Following this Court's decision in *Booker*, Petitioner sought relief under the provisions of that case. In each instance, the Eleventh Circuit refused to consider these issues because of its unique, harsh, and severely criticized "initial brief" rule which forecloses consideration of any issue not raised in the Appellant's Opening Brief. See *United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004) (per curiam), and footnote 1, *infra*.

This rule denies Petitioner, and others similarly situated, due process of law, and creates a very deep and severe conflict in the Circuits.

SUMMARY OF JURISDICTION

The unpublished Memorandum Opinion of the United States Court of Appeals for the Eleventh Circuit was filed June 24, 2005. [Appendix A]. A timely Petition for Rehearing and Petition for Rehearing En Banc was denied August 9, 2005 [Appendix B].

Jurisdiction is appropriate under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States states:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SUMMARY OF ARGUMENT

This Petition raises substantial issues concerning the denial of access to the benefits of *United States v. Booker*, *supra*, to a number of appellants, such as Martin Chambers, whose Opening Briefs were filed before this Court's decision in *Blakely v. Washington*, *supra*, because of the Eleventh Circuit's unique, unconstitutional, and criticized "initial brief" rule.¹ Pursuant to this rule, an issue not raised in an appellant's Opening Brief will not be considered by the court, despite the fact that the authority upon which it is based did not exist at the time that the Opening Brief was filed.

This incredibly harsh rule is imposed in *Blakely/Booker* cases, despite the Eleventh Circuit's candid recognition that contrary precedent nationwide held before *Blakely* that the principles of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) did not apply to cases such as this:

"This omission [of an *Apprendi* argument] is certainly understandable in that neither *Blakely* nor *Booker* had been decided, and then-controlling circuit precedent held that the Sixth Amendment right to a trial by jury, as explicated in *Apprendi*, 'ha[d] no application to, or effect on, . . . Sentencing Guidelines calculations, when . . . the ultimate sentence imposed does not exceed

¹ See *United States v. Dockery*, 401 F.3d 1261, 1262 (11th Cir. 2005); *United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004), *Rehearing En Banc denied*, 391 F.3d 1327 (11th Cir. 2004), *vacated by* ___ U.S. ___, 125 S.Ct. 2542 (2005), *reinstated by* ___ F.3d ___, 2005 W.L. 1620719 (11th Cir., June 12, 2005); and *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001).

the prescribed statutory maximum penalty,' *United States v. Sanchez*, 269 F.3d 1250, 1288 (11th Cir. 2001) (*en banc*).” *United States v. Vanorden*, __ F.3d __, No. 03-11083 (11th Cir., June 30, 2005), at footnote 1.

The application of this rule, particularly as applied to *Booker* claims, has come under severe attack *even within the Eleventh Circuit*.

“Based upon the doctrine of *stare decisis*, I am convinced that our court is correct in holding that the Bordons cannot now bring *Booker* to our attention. *The Bordons should have claimed relief under Booker -- before Booker was decided!*

“For this precedent I am sorry. I confess that this feeling has long and deep roots. See *McGinnis v. Ingram Equip. Co., Inc.*, 918 F.2d 1491, 1498-1501 (11th Cir. 1990) (Hill, J., dissenting). In *McGinnis*, I probably said all that I needed to say on this subject. I won't repeat it here. *Id.*” *United States v. Borden*, __ F.3d __, No. 04-10654 (11th Cir., August 25, 2005), Hill, Circuit Judge, concurring.

“This is a strange rule we have: in a case in which the Supreme Court has vacated our decision for ‘further consideration in light of [*Booker*],’ precisely *because* we did not have the benefit of *Booker* when we rendered our first decision, we declined to

actually consider the *Booker* issue on the ground that it was not raised when we issued that first decision. As I have explained elsewhere, it is also a very bad rule, as it is not only inconsistent with Supreme Court precedent and the law of every other circuit, but also encourages defendants-appellants to raise frivolous claims that are squarely foreclosed by circuit and Supreme Court precedent on the off chance that an unanticipated decision will make them suddenly viable. See *United States v. Levy*, 391 F.3d 1327, 1335-51 (11th Cir. 2004) (Tjoflat, J., dissenting the denial of Rehearing En Banc)" *United States v. Vanorden*, *supra*, Tjoflat, Circuit Judge, specially concurring.

Here, Petitioner tried repeatedly, and in a timely manner, to raise the *Blakely/Booker* issues. He filed a "Motion for Leave to Supplement Appellant's Opening Brief Under *Blakely v. Washington*" [Appendix C]. Because this motion had not been acted upon by the time of the filing of his Reply Brief, he filed a *Blakely* argument in his Reply Brief [Appendix D]. The government moved to strike this argument from the Reply Brief [Appendix E]. Chambers opposed the motion noting *United States v. Sanchez*, *supra*, had specifically held that *Apprendi* only applied to sentencing facts "that increased the penalty for a crime beyond the prescribed statutory maximum" [Appendix F]. The Eleventh Circuit, by order on September 2, 2004 [Appendix G], denied the motion for leave to supplement the brief to raise *Blakely* issues, and granted the government's motion to strike this argument from the Reply Brief.

Following this Court's decision in *United States v. Booker, supra*, Petitioner filed a motion for remand for resentencing pursuant to *Booker*. [Appendix H]. These motions were summarily rejected by the Eleventh Circuit:

"Chambers has continued to file motions with this Court asking to be resentenced in light of *Booker*. Because the *Booker* issue was not raised in Chambers' initial brief to this Court we do not consider it." Memorandum Opinion [Appendix A], footnote 3.

This rule, which is unique in the federal circuits, arbitrarily and unconstitutionally denies criminal defendants access to new decisions from this Court, applicable to all cases on direct appeal, based solely on the fortuity of the filing date of the Opening Brief. It is a denial of due process, and one which substantially affects the sentence of this Petitioner.

STATEMENT OF THE CASE

Martin Chambers was indicted in the United States District Court for the Southern District of Florida, and charged with conspiracy to launder purported drug money, and four counts of money laundering in violation of Title 18 U.S.C. §§1956(h) and 1956(a)(3)(B). Following conviction by a jury, he was sentenced to a term of incarceration of 188 months, the bottom of guideline level 36.²

The district court denied a motion for downward departure based upon personal characteristics of the appellant, including his having rescued several individuals at the risk of his own life, and concluded that these factors did not justify a downward departure. However, the court noted:

"The Court: Well, you know, the guidelines don't ask us to look at whether or not the person is outside the heartland of the guidelines; and that is one of the problems with the guidelines, which is that the more complex the individual is who is before

² The calculations made by the district court were as follows:

- | | |
|--|----|
| 1. Base offense level §2S1.1(a)(2)
[including the value of the laundered
funds as \$700,000] | 22 |
| 2. Knowledge that the laundered funds were
proceeds of drugs, §2S1.1(b)(1) and (a)(2) | +6 |
| 3. Conviction under 18 U.S.C. §1956,
§2S1.1(b)(2)(B) | +2 |
| 4. Sophisticated laundering pursuant to
U.S.C. §1.1(b)(3) | +2 |
| 5. Role in the offense, §3B1.1(c) | +2 |
| 6. Adjustment for obstruction of justice, §3C1.1 | +2 |

the court, *the less adequate the guidelines are to address what the appropriate punishment might be.*" Transcript 12-5-2003, page 93, lines 18-24 [Appendix G] (emphasis added).

In addition, the court refused the government's request to impose a sentence at the upper end of the guideline level. These factors indicate a "reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge." *United States v. Curtis*, 400 F.3d 1334, 1336 (11th Cir. 2005) (per curiam) quoting *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir.), *cert denied*, ___ U.S. ___, 125 S.Ct. 2935 (2005).

Chambers appealed to the United States Court of Appeals for the Eleventh Circuit, and filed his Opening Brief in a timely fashion on April 13, 2004. This Court decided *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004) on June 24, 2004, two months *after* the filing of the Opening Brief. *Blakely* applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000) in a Washington State sentencing context to enhancements to a sentence based upon facts not considered or found by a jury. Prior to that time, and before the petitioner's sentencing in the district court, the Eleventh Circuit, as had every other circuit, determined *specifically* that *Apprendi* only applied to sentencing facts "that increased the penalty for a crime beyond the prescribed statutory maximum." *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001).

In response to *Blakely*, petitioner filed on July 2, 2004, a "Motion for Leave to Supplement Appellant's Opening Brief under *Blakely v. Washington*" [Appendix C]. The government opposed the filing of this brief by a pleading filed on or about July 19, 2004. No ruling was entered regarding

this motion, however, by the time appellant timely filed his Reply Brief on July 22, 2004. In that Reply Brief [Appendix D] Chambers argued as Argument V that "The appellant must be resentenced because substantial upward adjustments were found against him in violation of *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004)".

The United States moved by a motion filed August 2, 2004 to strike this argument from the brief. [Appendix E]. Chambers opposed the motion to strike in a pleading filed August 9, 2004. [Appendix F]. In that pleading, petitioner specifically directed the Circuit's attention to its *Sanchez* decision, which made raising the *Apprendi* claim both at the sentencing and in the Opening Brief, which occurred after *Sanchez*, but before *Blakely*, completely futile.

Petitioner further noted that *Blakely* established a new rule of constitutional law which this Court required to be applied "to cases pending on direct review". See *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987).

By order of September 2, 2004, the Eleventh Circuit denied the motion for leave to supplement the brief to raise the *Blakely* issue, and granted the government's motion to strike this argument from the appellant's Reply Brief. [Appendix G].

On January 12, 2005, this Court decided *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005). This Court recognized in *Booker* that "we must apply today's holding – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." 125 S.Ct. at 769. With regard to cases then on appeal, the Court concluded the a "plain error" standard of review is to be applied. *Id.*

Petitioner, on March 14, 2005 filed a Motion for Remand for Resentencing pursuant to *Booker*. [Appendix H].

In its unpublished Opinion of June 24, 2005, page 16, n.3, the Eleventh Circuit, recognized a portion of this history, and refused to consider the *Booker* issue, because *Booker* was "not raised in Chambers' initial brief to this court".

A timely Petition for Rehearing again claimed that the court's refusal to consider the *Booker/Blakely* issued denied petitioner due process and equal protection of the law. [Appendix I]. That Petition for Rehearing was denied without comment on August 9, 2005. [Appendix B].

REASONS FOR GRANTING THE WRIT

I. THE "INITIAL" BRIEF RULE OF THE ELEVENTH CIRCUIT COURT OF APPEALS PRESENTS AN UNCONSCIONABLE AND UNCONSTITUTIONAL BAR TO ACCESS TO DECISIONS OF THIS COURT WHICH ARE REQUIRED TO BE APPLIED TO ALL CASES STILL ON DIRECT APPEAL

1. The "initial brief" rule has been severely criticized even within the Eleventh Circuit, is unique among the circuits, denies petitioners such as Chambers due process and equal protection of the law, and presents a deep and significant conflict among the circuits.

The Eleventh Circuit stands alone in refusing to hear issues which were not raised in an initial brief. While the propriety of the general application of such a rule is highly questionable, its application to a new rule established by this Court and previously rejected not only by the Eleventh Circuit, but by every circuit in the United States, is irrational and unconstitutional.

Not only does this rule deprive litigants of their due process and equal protection rights, but it imposes upon them the impossible burden of raising every imaginable issue, although settled by every circuit in the land, on the off chance that this Court, or the Eleventh Circuit, might later decide differently. In the Eleventh Circuit, a litigant would be well advised to include an argument which contains a laundry list of every rational and irrational argument which could be made. Such a result is absurd.

Because of the abject irrationality of the rule, it is not surprising that it has come under severe and persistent attack even within the Eleventh Circuit. Frustrated judges from that circuit, bound by *stare decisis*, rail against the inequities of the rule, but are powerless to expunge it. It is clear that this salutary effect can only be accomplished by this Court.

The use of the "initial brief" rule to block claims under *Apprendi*, *Blakely*, and *Booker* is consistent throughout the Eleventh Circuit.

In *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001) on denial of *en banc*, previous opinion 242 F.3d 989 (11th Cir. 2001) the decision in *Apprendi* was raised in a Petition for Rehearing which was denied. This Court then vacated and remanded, leading to a reinstatement of the earlier decision in *United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001). A Suggestion for Rehearing En Banc was then denied. *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001). Four judges concurred in the denial (Judges Carnes, Black, Hull and Marcus), while two dissented (Judges Tjoflat and Barkett).

Similarly, in *United States v. Ford*, 270 F.3d 1346 (11th Cir. 2001) *Apprendi* was raised in a Petition for Rehearing which was denied. This Court vacated and remanded, and the original result was reinstated pursuant to the initial brief rule.

The *Apprendi* issues were finally put to rest by the circuit in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001). However, a similar fate has befallen defendants attempting to raise *Blakely*.

In *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) on denial of *en banc*, previous opinion 379 F.3d 1241 (11th Cir. 2004), *Blakely* was raised in a Petition for Rehearing.

The matter was vacated and remanded by this Court, and the original decision was reinstated. In this case, the denial of the *en banc* suggestion led to four concurring judges [Judges Carnes, Hull, Anderson and Pryor] and two dissenters [Judges Tjoflat and Wilson].

Booker fared no better.

In *United States v. Verbitskaya*, 406 F.3d 1324, (11th Cir. 2005) a motion to file a supplemental brief under *Blakely* was denied. Supplemental authority submitted after *Booker* was decided was rejected under the initial brief rule.

In *United States v. Vanorden*, __ F.3d __, No. 03-11083 (11th Cir., June 30, 2005) the earlier decision of the circuit was vacated and remanded for further consideration under *Booker*. Under the initial brief rule, and over a sharp dissent from Judge Tjoflat, the original decision was reinstated. Similar results occurred in *United States v. Bordon*, __ F.3d __, No. 04-10654 (11th Cir., August 25, 2005), at n.1, *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005), and *United States v. Smith*, __ F.3d __, No. 03-15299 (11th Cir., July 18, 2005).

Application of this rule to Chambers, and these other appellants, raises serious due process and equal protection concerns.

2. This court in *Booker* was unequivocal in the reach of its application.

“As these dispositions indicate, we must apply today’s holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to

all cases on direct review. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)."
United States v. Booker, 125 S. Ct. at 769.

This Court relied upon the longstanding rule of *Griffith v. Kentucky* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past". 479 U.S. 314 at 328 (1987).

The imperative for retroactive application found two related bases in *Griffith*. First, the "integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 322-323.

"Second, selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.*

These concerns led to stinging dissents by Judge Tjoflat, joined in by other members of the court, in *United States v. Levy, supra*, 391 F.3d 1327, 1335 at 1337 (11th Cir. 2004), and *United States v. Vanorden, supra*.

It is particularly abhorrent that Chambers may be suffering under an illegal sentence which, because of its length [188 months], (much of which was based upon facts never found by a jury, and improperly calculated under *Booker*), and his age [65], may well be a life sentence. He has been denied a substantive constitutional protection by the application of a procedural rule. He, like others similarly situated, is therefore deprived of due process.

The equal protection claims are equally compelling. In terms of the right to have this issue heard, how is Chambers rationally differentiated from an individual litigant whose Opening Brief was filed approximately 70 days later, and thus could have included *Blakely*, and taken advantage of *Booker*? There is no rational distinction between these individuals. There is only the luck of timing.

Therefore, with regard to similarly situated litigants within the Eleventh Circuit, he is denied equal protection of the law.

But it is also true that, compared to similar litigants in every other jurisdiction, he is being treated substantially differently, for no rational reason. As Judge Tjoflat noted in his dissent from the denial of *en banc* in *United States v. Levy*, *supra*, 391 F.3d 1327, 1340:

"This continues to be the only Circuit in which 'cases are entitled to the benefit of the intervening decision *only* if: (1) the case was not yet final at the time of the intervening decision; *and* (2) the litigant presaged the intervening decision by raising the issue addressed by that decision in the litigant's brief on appeal.'" (Emphasis in original).

3. Particularly in view of the concerns expressed by the district judge in this case regarding the inadequacy of the guidelines to take into account personal characteristics of Chambers, the due process and equal protection issues presented here strongly argue in favor of a modification or a renunciation of the initial brief rule. Chambers' predicament arises because of a lack of prescience and the serendipity of

timing. The quality of criminal justice should hardly hang on such thin threads.

CONCLUSION

Petitioner Martin Chambers was sentenced in the Southern District of Florida at a time when the Eleventh Circuit, and every other Circuit, had determined that *Apprendi v. New Jersey*, *supra*, had no applicability to normal calculations under the United States Sentencing Guidelines. At his sentencing, the district court judge expressed frustration with the inability to consider certain personal characteristics of Chambers in entering the sentence. The court ultimately rejected a government request for a higher sentence, and sentenced Chambers to the low end of the applicable guideline range. A substantial portion of that guideline calculation was based on factors which, after *Booker*, would now be improper.

Chambers timely filed an Opening Brief in the Eleventh Circuit. Approximately 70 days later, this Court decided *Blakely v. Washington*, *supra*. Had Chambers been dilatory in the filing of his brief, he could have included the *Blakely* argument. Because he had acted prudently and timely, he did not. But he immediately sought, through a number of mechanisms, to raise *Blakely*. All of these efforts were blocked by the Eleventh Circuit because of the "initial brief" rule.

Ultimately, but before the decision in his case was entered, this Court decided *United States v. Booker*, *supra*. Again, Chambers sought to raise the *Booker/Blakely* issues, and again he was rebuffed by the court because of the "initial brief" rule.

The inequities of this situation are apparent. He is asked by the Eleventh Circuit to presage a change in the law which

had been rejected by every federal circuit. He is told he must be treated differently because his brief was filed 70 days before this Court's decision in *Blakely*. He is instructed that his sentencing issue, which could have a dramatic effect on his ultimate term of imprisonment, would be considered in every other federal jurisdiction but the Eleventh Circuit.

Chambers asks how this can be justified. There is no rational answer for him. Nor is there any just or legal explanation.

As has been shown, Chambers is not alone, but is one of many criminal defendants in the Eleventh Circuit suffering this fate. This Court, through a Writ of Certiorari, should direct the Eleventh Circuit, at least with regard to cases such as Chambers, to abrogate or modify its "initial brief" rule, and to give substantive consideration to petitioner's *Booker/Blakely* claims.

DATED: October 28, 2005

Respectfully submitted,

DONALD M. RÉ
A Professional Law Corporation

DONALD M. RÉ

Attorney for Petitioner
MARTIN CHAMBERS

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
June 24, 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16469

D.C. Docket No. 02-20669-CR-UUB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN G. CHAMBERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 24, 2005)

Before BIRCH, CARNES and RONEY, Circuit Judges.

PER CURIAM:

Following a sting operation conducted jointly by the FBI and the Royal Canadian Mounted Police, Martin Chambers, a Canadian citizen, was arrested in the United States and charged with one count of conspiracy to launder drug money, in violation of 18 U.S.C. § 1956(h), and with four counts of money laundering, in violation of 18 U.S.C. § 1956(a)(3)(B) and § 2. Chambers was convicted by a jury of all charges, and he was sentenced to 188 months imprisonment.

Chambers contends that: (1) the district court erred by not dismissing his indictment due to "outrageous government misconduct"; (2) the district court improperly admitted testimony (3) the evidence was insufficient to sustain his conviction; and, (4) the district court erroneously concluded during sentencing that it lacked the jurisdiction to downwardly depart.

I.

In 2002 Corporal William Majcher of the Royal Canadian Mounted Police was assisting the FBI in an undercover operation called "Bermuda Short." Majcher played the role of financial front man for a cocaine cartel run by "Ricardo," a fictional Columbian national played by an FBI special agent. Majcher pretended to Kevan Garner, a Canadian citizen, that he was attempting to launder drug money. In response Garner suggested that they contact Chambers. Garner described Chambers as a man who could introduce large amounts of illegally obtained cash into the legitimate banking system.

The RCMP had previously investigated Chambers in connection with a stock manipulation scheme, but that investigation had not resulted in any charges against him. Upon learning that Chambers would become a target of "Operation Bermuda Short," Corporal Majcher made several

telephone calls to friends and associates expressing his excitement, telling them that he had hit the "grand slam" and vowing to do "whatever" it would take to "get" Chambers. Majcher also expressed his desire to have Chambers prosecuted and sentenced in the United States instead of Canada. American law would allow Majcher to record all of his conversations with Chambers without Chambers' consent or judicial approval, making it easier to build a case against Chambers. It also offered harsher sentences in drug cases than Canadian law.

Garner arranged the first series of meetings between Corporal Majcher and Chambers for April 11, 2002 in South Florida. Before that meeting Garner advised Majcher that it would not be necessary to tell Chambers that the money they would be laundering originated in the drug trade. Garner recommended: "Just don't mention . . . the source." Majcher followed Garner's advice, though he did make a series of comments to Chambers during the meeting which indicated that the money came from an illegitimate source. He told Chambers they didn't want to take any risks laundering the money because "we feel that we are already taking the risk in the initial instance and there's no need to duplicate that." In response to Majcher's comments, Chambers replied: "I am not unfamiliar with historical reasons with your perspective."

Chambers informed Corporal Majcher that he and a close friend had formed a bank in Barbados in connection with the Russian mafia. He offered to introduce Majcher to Michael Hepburn, a Bahamian banker, the next day. Chambers told Majcher that Hepburn and his associates had "indicated that they're prepared to take and deposit substantial quantities of cash and they have no limits in doing so." There would be no need, Chambers said, for Majcher to mention his "antecedents and background" to Hepburn. Chambers reminded Majcher

that the transactions they were discussing were not "conventional" and stated that "this is as risky situation for us as for you." Chambers also informed Majcher that there would be a fee for depositing the cash, and he discussed keeping a portion of the cash on deposit to avoid regulatory attention.

On April 12, 2002, before they met with Chambers and Hepburn, Garner had told Chambers and Hepburn that "Ricardo" (the fictional drug lord) was a member of a family involved in importing and exporting commodities in South America. Garner had explained to them that Ricardo's family only invoiced purchasers for half of the goods they actually sold and accepted cash for the other half. Ricardo now wanted to launder the cash receipts. In light of Garner's earlier representations to Chambers and Hepburn, Corporal Majcher did not mention the source of the money during his April 12 meeting with them. Majcher did discuss his own background in commodities and described Ricardo's family as involved in the import and export of grain.

With respect to the money laundering, Corporal Majcher told Chambers and Hepburn that they were looking for "something that passes any smell test." Hepburn explained that 6% to 12% of the cash deposits would be assessed as a fee; he described this fee as reasonable considering the fact that most banks would not accept the cash at all. During this meeting, Chambers and Hepburn created a shell corporation, "Northern Star Investments, Limited," to disguise the source of the money they would receive. Chambers prepared applications to open bank accounts for Northern Star. While Chambers was out of the room, Hepburn asked Majcher if he was satisfied that there was no drug connection to the money. Majcher "blew him off."

The next meeting between Corporal Majcher and Chambers was about six weeks later on May 24, 2002. They discussed the logistics of money laundering. Chambers suggested bribing a Bahamian police official and using Chinese supermarkets as a method of moving cash. Majcher then informed Chambers about a conversation he had with Hepburn that had "made [him] very unhappy." He told Chambers that Hepburn had asked if he was satisfied that none of the money they were laundering came from drug trafficking. Chambers told Majcher that he was aware of the conversation. Majcher then described his reaction to Hepburn's inquiry:

I'm fuckin looking at this guy, and I'm looking at him, you know, yeah, yeah, it's fuckin cocaine, K-O-K-A-N-E, what are you, a fuckin moron? I mean, I, and in fact I blew him off, I just laughed at him and said what are you, fuckin kidding me? I mean, of course this is cocaine money, you think I'm going to fucking sit there and tell you what this is? You know, like, what the fuck are you? Like, [Chambers], I didn't appreciate that and I'm wondering, is this a set-up? Is this, am I the guy being set up here? Like, I was not an hap-, a happy camper at that point.

Chambers replied that he "was appalled when [he] heard it, appalled." Majcher continued to express concern over whether he was being set-up. He declared that he only wanted to "deal with professionals." As Majcher ranted, Chambers twice replied, "Exactly." Majcher then said, "I mean, [Chambers], you know what we're talking about here. I mean, let's - let's us agree right now." Chambers replied: "Ah, we know exactly what we're talking about."

Later in the meeting, Corporal Majcher described "Ricardo": "He uh, he's a proud guy, he's a family guy, uh, you know what, the cocaine side of the business is not his business, he is purely the money side, uh, he doesn't want to see any comments or references uh, to it."

On May 24, 2002 Corporal Majcher gave Chambers two large tote bags filled with \$500,000 in cash, Majcher and Chambers discussed their respective abilities to hide if the police became aware of their activities. By June 13, 2002, about \$446,000 of the \$500,000 was returned, via wire transfer, to Majcher's account at a SunTrust Bank in Miami.

On June 18, 2002 Chambers and Corporal Majcher met to discuss the next transaction. Chambers became confrontational when Majcher informed him that the \$200,000 for the next transaction was not yet available.

On June 19, 2002 Corporal Majcher delivered \$200,000 to Chambers and Hepburn. Majcher and Hepburn discussed the fees for laundering the money. Chambers told Majcher that he had lived in the world that Majcher lived in and that "I know exactly what you're dealing with." He also commented: "To a very limited extent and not by choice, I operate in a not totally dissimilar world to the one you're referring to in your principals."

On July 29, 2002, \$125,000 of the \$200,000 was returned, via wire transfer, to Corporal Majcher's account at SunTrust Bank in Miami. On August 11 another \$25,000 was wired to Majcher. Chambers was arrested before he could transfer the remainder of the money.

II.

Chambers contends that his right to substantive due process was violated by the joint investigation between the United States and Canada. He argues that his due process rights were violated when the two governments collaborated to lure him, a Canadian citizen, into the United States to commit a crime because a conviction would be easier to obtain in the United States and harsher penalties would be available here. He also alleges that his rights were violated when the two governments conspired to violate Canadian law by recording his conversations without his consent or judicial approval as required by the Canadian Charter. Chambers claims that it is hard to imagine anything more shocking than the United States inducing the law enforcement of another country to violate its own laws, which he describes as conduct so inherently offensive that it implicates the Fifth Amendment's Due Process Clause and warrants dismissal of the indictment against him.

Chambers has no authority close to point. He primarily relies on *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952), where evidence collection methods "shock[ed] the conscience" and violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 172, 72 S. Ct. at 209. Though *Rochin* was based on the Due Process Clause of the Fourteenth Amendment, the Supreme Court has indicated that an analogous right to substantive due process exists under the Fifth Amendment. See *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1643 (1973) (citing *Rochin* and stating that the Court "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction").

The law enforcement conduct in this case falls far short of that which led to the reversal of the conviction in *Rochin*. In that case law enforcement broke into the defendant's house, physically assaulted him in an effort to remove capsules from his mouth, handcuffed him, took him to a hospital and had his stomach pumped against his will. *Rochin*, 342 U.S. at 166, 72 S. Ct. at 206. Chambers' stomach was not pumped, he was not assaulted, and he was not forced to travel to South Florida or to launder drug money. See *United States v. Haimowitz*, 725 F.2d 1561, 1577 (11th Cir. 1984) (noting that an individual who is invited "to participate in an illegal scheme can simply say 'No'").

Chambers voluntarily, of not eagerly, traveled to South Florida in order to meet with Corporal Majcher and discuss the money laundering scheme. Chambers introduced Majcher to Hepburn, a banker who could process large amounts of illegally obtained cash. Chambers suggested vehicles for laundering money and strategies for avoiding detection. He actually introduced \$700,000 of cash into the legitimate banking system. There is nothing shocking about law enforcement agents giving Chambers an opportunity to commit the crimes he did so that they could prosecute him. Majcher's eagerness to apprehend Chambers might appear unseemly to some, but it certainly does not shock the conscience.

Nor is there anything unconstitutional about the agents planning the sting so that Chamber committed most of the criminal acts in this country instead of in Canada. There is no right to have criminal opportunities occur in the location with the most lenient laws. Chambers insists that the agents violated Canadian law when they recorded his conversations without prior judicial approval or his consent, but those recordings took place in this country. Chambers has not

persuaded us that the Canadian law relating to recorded conversations applies to activities that take place in this country, and we cannot imagine that it does. Even if Canada intended for its laws to apply to criminal conduct occurring in this country, failure to give effect to that intent is not something that shocks our conscience.

III.

Chambers' second contention is that the district court improperly admitted some testimony. We reviewed the district court's evidentiary rulings for abuse of discretion. *Tampa Bay Shipbldg. & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1216 (11th Cir. 2003). "A district court's evidentiary rulings are not subject to reversal on appeal absent a clear abuse of discretion." *Id.*

The jurors were presented with tape recordings of all the conversations between Corporal Majcher and Chambers. Majcher explained to the jury what various statements in those conversations meant to him. Chambers argues that the district court improperly allowed Majcher to testify about what Chambers thought, believed, and knew. Majcher was permitted to testify as a law witness under Fed. R. Evid. 701 about his understanding of the conversations. For over twenty years, this type of testimony by a law enforcement agent has been admissible in this circuit. See *United States v. Novaton*, 271 F.3d 968, 1008, (11th Cir. 2001) (stating that "we have specifically held on a number of occasions that district courts did not abuse their discretion by permitting police officers to testify under Rule 701 about their understanding of the meaning of conversations by or with criminal defendants"); *United States v. Awan*, 966 F.2d 1415, 1428-31 (11th Cir. 1992) (upholding the admission, in a case involving laundering of drug proceeds, of an undercover officer's explanations of

comments made by the defendant during tape-recorded conversations with the officer); *United States v. Russell*, 703 F.2d 1243, 1248 (11th Cir. 1983) (upholding the admission of a law enforcement agent's testimony concerning the meaning of tape-recorded conversations he had with the defendant).

Rule 701 was amended in 2000 to add subdivision (c).¹ We have held, however, that this amendment does not alter our Rule 701 jurisprudence in cases where law enforcement officers testify as lay witnesses. *Tampa Bay Shipbldg. & Repair Co.*, 320 F.3d at 1220-23; *see also id.* at 1223 n.17 ("We find no basis to determine that *Novaton . . . and Myers*, based on their facts, require a different finding after Rule 701's Amendment."). The district court's admission of Corporal Majcher's testimony accords with our case law; the district court did not abuse its discretion.²

¹ Rule 701 now states:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701.

² Chambers also asserts that Corporal Majcher's testimony was expert testimony governed by Rules 702 and 704(b) rather than by Rule 701. Because this argument was not raised before the district court, we do not consider it. *See United States v. Prichett*, 898 F.2d 130, 131 (11th Cir. 1990) ("[W]e will not consider an argument raised for the first time on appeal.").

IV.

Chambers next contends that the evidence was insufficient to convict him under 18 U.S.C. §§1956(a)(3)(B) & (h). To be convicted under that statute, the defendant must have been aware that the funds being laundered were obtained through drug trafficking. Chambers argues that the evidence was not sufficient to prove that he knew the origin of the funds.

We review *de novo* whether there was sufficient evidence to support a conviction, viewing all the evidence in the light most favorable to the government. *United States v. Majors*, 196 F.3d 1206, 1210 (11th Cir. 1999). "Accepting all reasonable inferences from the evidence which support the verdict, we will affirm the convictions if a reasonable fact-finder could have reached a conclusion of guilt beyond a reasonable doubt." *Id.* Though many of the statements made by Corporal Majcher and Chambers were oblique, there was enough evidence for a reasonable factfinder to have concluded that Chambers was guilty beyond a reasonable doubt of laundering and conspiring to launder drug money.

Chambers told Corporal Majcher that he did not need to mention his "antecedents and background" to Hepburn, the banker. After Hepburn asked Majcher if he was sure the money they were laundering didn't come from drugs, Majcher told Chambers that he wanted to "deal with professionals." Chambers replied: "Ah, we know exactly what we're talking about." During one meeting, Majcher said of "Ricardo": "[T]he cocaine side of the business is not his business, he is purely the money side, uh, he doesn't want to see any comments or references uh, to it." The jury reasonably could have inferred from these comments that Chambers knew that it was drug money they were laundering.

V.

Finally, Chambers asserts that the district court committed reversible error by refusing to consider granting him a downward departure, pursuant to U.S.S.G. § 5K2.0, due to his "extraordinary" characteristics.

We lack jurisdiction to review a sentencing court's refusal to depart downward when that decision is based on the district court's discretionary authority. *United States v. Hansen*, 262 F.3d 1217, 1257 (11th Cir. 2001) (per curiam). If, however, the sentencing court concluded that it lacked the authority to depart downward, we have jurisdiction and review the district court's conclusion de novo. *United States v. Pressley*, 345 F.3d 1205, 1209 (11th Cir. 2003).

At his sentencing hearing, Chambers made a motion for a downward departure based on a combination of factors. He asked for the departure based on his age, health, medical condition, and status as the father of a two-year-old son. He also asked that the departure be granted out of recognition for several "heroic" acts he claims to have performed and out of recognition for the substantial environmental work he has engaged in over the years. The Court declined to depart.

Chambers argues that the district court improperly concluded that it lacked the authority to depart downward. He bases his argument on the following statement the district court made during sentencing:

Well, you know, the guidelines don't ask us to look at whether or not the person is outside the heartland of the guidelines; and that is one of the problems with the guidelines, which is that the more complex the individual

is who is before the Court, the less adequate the guidelines are to address what the appropriate punishment might be.

Though this statement could possibly be interpreted as indicating that the district court thought it lacked the authority to depart downward, a further review of the sentencing transcript leads to the opposite conclusion.

After the court made the statement that is quoted in the preceding paragraph, it heard from the government. After the government had finished with its remarks, the court stated:

Okay. Well, certainly the defendant's age, his status as a father of a young child, and his health are not individually or, or taken together, enough to take him outside the heartland of the guidelines.

This other issue is a hard issue to get a handle on, but I don't know that I would say that this case, because of Mr. Chambers' work on behalf of the environment, is outside the heartland of the guidelines, because oftentimes we see people who have a disassociative capacity where they're able to operate and justify to themselves doing so outside the law and at the same time do many things that are good and productive for society.

So, I don't think that I can say that because Mr. Chambers had a particular interest in the environment and acted on that to a degree that is remarkable takes the case or the sentencing of Mr. Chambers outside the

heartland. So, I'm not going to depart on this basis. I think it is appropriate to consider it in connection with where he should be sentenced within the guidelines.

The court then proceeded to sentence Chambers at the low-end of the applicable guideline range, rejecting the government's request that he be sentenced in the mid-range.

The court's comments indicate that it did not conclude it lacked the authority to depart downward; instead, it chose not to depart downward. The court decided to give effect to the mitigating circumstances Chambers presented by sentencing him at the low-end of the guidelines range instead of by granting him a downward departure. Because the district court's decision not to grant a downward departure was based on its discretionary authority, this Court lacks jurisdiction to review the decision.³

³ In his reply brief to this Court, Chambers challenged for the first time the constitutionality of his sentence under *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), which has now been extended by the Supreme Court in *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005). The government filed a "Motion to Strike New Issue Raised in Appellant's Reply Brief." We granted that motion.

Chambers has continued to file motions with this Court asking to be resentenced in light of *Booker*. Because the *Booker* issue was not raised in Chambers' initial brief to this Court, we do not consider it. See *United States v. Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004) (per curiam).

AFFIRMED.

RONY, Circuit Judge, specially concurring:

I concur in the result and the reasoning contained in the opinion.

B-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16469-JJ

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 09, 2005
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN G. CHAMBERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before BIRCH, CARNES and RONEY, Circuit Judges.

PER CURIAM:

B-2

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E O CARNES
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RECEIVED
CLERK
U.S. COURT OF APPEALS
JUL 02, 2004
ATLANTA, GA

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

MARTIN G. CHAMBERS,

Defendant/Appellant.

USCA No. 03-16469
USDC No. 02-20669-CR UUB
(Southern District of Florida)

MOTION FOR LEAVE TO SUPPLEMENT
APPELLANT'S OPENING BRIEF UNDER

Blakely v. Washington, __ U.S. __,
2004 WL 1402697 (June 24, 2004)

COMES NOW the appellant Martin Chambers who seeks leave of this court to supplement the appellant's Opening Brief with regard to the illegality of appellant's sentence under *Blakely v. Washington*, __ U.S. __, 2004 WL 1402697 (June 24, 2004).

This motion is made upon the following grounds:

1. The Supreme Court, in *Blakely v. Washington*, *supra*, decided June 24, 2004, analyzed a sentencing scheme very similar to the United States Sentencing Guidelines. *Blakely* applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to enhancements to a sentence, based upon facts not considered by a jury. *For the court, the critical fact was the sentence a judge may impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."* 2004 W.L. 1402697 (emphasis in original).

The court stated it another way:

"When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment.'" *Id.*

In this case, Chambers was determined to have a final offense level 36. This included 2 points for role under U.S.S.G. §3B1.1(c); 2 points for obstruction of justice under U.S.S.G. §3C1.1; and 2 points for sophisticated laundering under §2S1.1(b)(3). At the very least, none of these findings were implicit in the jury verdict. Under *Blakely*, therefore, at least these six additional points were improperly assessed.

2. The distinction is critical to Chambers, because his sentence of 188 months can be reduced by approximately 60-90 months (5-7 1/2 years) without these additional enhancements.

3. Appellant therefore respectfully requests leave of court to supplement his Appellant's Opening Brief. In the words of Justice O'Connor, in dissent in *Blakely*:

"Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy." *Id.* at 1402697 (O'Connor, J., dissenting).

4. No prior application for this relief has been made.

5. Appellant Martin Chambers is currently incarcerated in the Bureau of Prisons, serving the 188 month sentence on this case.

DATED: June 29, 2004.

Respectfully submitted,

DONALD M. RÉ
A Professional Law Corporation

/s/ DONALD M. É
DONALD M. RÉ
Attorney for Appellant
MARTIN CHAMBERS

(Proof of Service and Certificate of Interested Persons have been omitted.)

**ARGUMENT SECTION OF
APPELLANT'S REPLY BRIEF
(Filed July 22, 2004)
(Pages 26-31)**

* * * *

**V. THE APPELLANT MUST BE RE-
SENTENCED BECAUSE SUBSTANTIAL
UPWARD ADJUSTMENTS WERE FOUND
AGAINST HIM, IN VIOLATION OF
BLAKELY V. WASHINGTON, 2004 WL
1402697 (JUNE 24, 2004)**

The United States Supreme Court on June 24, 2004 changed the legal landscape with regard to sentencing. Its decision in *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531, 2004 WL 1402697 (June 24, 2004) held unconstitutional a Washington state sentencing scheme very similar to the United States Sentencing Guidelines.

The cornerstone of *Blakely*, which has sent shock waves through the federal system, is its application of the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000):

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."

Blakely concluded that the "statutory maximum" for *Apprendi* purposes is:

“... the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” 2004 WL 1402697 (Emphasis in *Blakely*). 124 S.Ct. 2537.

Because the Washington state system is very similar to the federal guidelines system, it [is] clear that *Blakely* regards the “statutory maximum” as being the guideline range which can be established by reference *only* to facts submitted to and found by a jury beyond a reasonable doubt. In essence, this translates to the base offense level of a given charge. Consequently, any upward adjustments or departures could not be based upon relevant conduct, cannot be decided by a judge, and cannot be determined on the basis of the preponderance of the evidence.

This application of *Apprendi*, is of course, unexpected and is directly contrary to the consistent decisions in this court regarding the application of *Apprendi*. *United States v. O’Neal*, 362 F.3d 1310 (11th Cir. 2004); *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001); *United States v. Tinoco*, 304 F.3d 1088, 1100 (11th Cir. 2002); *United States v. Nealy*, 223 F.3d 825, 829 n.3 (11th Cir. 2000); *United States v. Harris*, 244 f.3d 828, 829-30 (11th Cir. 2001).

Since the decision in *Blakely*, courts have come to a variety of conclusions regarding its effect on the federal guidelines. Compare *United States v. Booker*, __ F.3d __, No. 03-4225 (7th Cir., July 9, 2004) (finding, in essence, upward adjustments unconstitutional under *Blakely*); with *United States v. Pineiro*, No. 03-30437 (5th Cir., July 12, 2004) (finding the federal guidelines constitutional in the fact of *Blakely*).

It appears, nonetheless, that, at the very least, upward adjustments imposed without a jury finding beyond a reasonable doubt are unconstitutional under *Blakely*.

In this case, Martin Chambers was sentenced to a term of 188 months (15 years 8 months), based upon the following analysis:

- | | |
|--|----|
| 1. Base offense level §2S1.1(a)(2)
[including the value of the laundered
funds as \$700,000] | 22 |
| 2. Knowledge that the laundered funds were
proceeds of drugs, §2S1.1(b)(1) and (a)(2) | +6 |
| 3. Conviction under 18 U.S.C. §1956,
§2S1.1(b)(2)(B) | +2 |
| 4. Sophisticated laundering pursuant to
U.S.C. §1.1(b)(3) | +2 |
| 5. Role in the offense, §3B1.1(c) | +2 |
| 6. Adjustment for obstruction of justice, §3C1.1 | +2 |

Of these, the following calculations are improper under *Blakely*, because they were not found by the jury beyond a reasonable doubt:

1. 2S1.1(a)(2) requires that the base offense level be 8 plus the number of levels from the table in §2B1.1. Because the value of the laundered funds was set at \$700,000, an additional 14 levels were added. Although the amount of laundered funds was contained in the indictment, the jury made *no finding*, and was directed to make no finding

regarding the exact amount of laundered funds. As a consequence, 14 points (from §2B1.1) are improper, and the base offense level should be 8.

2. Sophisticated laundering under 2S1.1(b)(3) was determined by the court based upon a preponderance of the evidence, and was never submitted to or decided by the jury. [+2].

3. The adjustment for role in the offense, under §3B1.1(c) was likewise determined by the court on a preponderance of the evidence standard, and never submitted to or decided by the jury. [+2].

4. An adjustment for obstruction of justice under §3C1.1 was determined after a hearing by the court based upon a preponderance of the evidence. Again, it was never submitted to or decided by the jury. [+2].

Because of the nature of the offense charged, it appears that the adjustments under §2S1.1(b)(1), regarding knowledge of the funds having been derived from drugs, and the fact of conviction under 18 U.S.C. §1956 pursuant to §2S1.1(b)(2)(B) apply.

The result is that Chambers, under *Blakely*, has a final score, before consideration of any downward departures, of 16. This provides him a sentencing range of 21-27 months.

While there is some dispute whether *Blakely* can be applied retroactively, to cases on collateral review [see *In re Dean*, No. 04-13244 (11th Cir., July 9, 2004)], there is no doubt that *Blakely* applies to cases on direct appeal, which are not final, such as this one.

Under *Teague v. Lane*, 489 U.S. 288, 301 (199):

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final".

It is clear from the position that this, and every other Circuit has taken, that no one predicted that *Apprendi* would be applied in the manner it was in *Blakely*. Clearly, this is a new rule which is applicable to cases which are not final. This point was underscored by Justice O'Connor, in her dissent in *Blakely*, where she recognized there is an unlikelihood that the rule would be applied retroactively to cases on collateral review, nonetheless:

"... all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack." *Blakely*, *supra*, 124 S.Ct. 2543, 2549 (O'Connor, J. dissenting).

Particularly for a man of Mr. Chambers' age, the enhanced sentence works a substantial prejudice against him, and should be vacated.

* * * *

E-1

NOS. 03-16469-BB

UNITED STATES OF AMERICA,

Appellee,

- versus -

MARTIN G. CHAMBERS,

Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**

**UNITED STATES' MOTION TO STRIKE NEW
ISSUE RAISED IN APPELLANT'S REPLY BRIEF**

Marcos Daniel Jiménez
United States Attorney
Attorney for Appellee
99 N.E. 4th Street
Miami, Florida 33132-2111
(305) 961-9145

Anne R. Schultz
Chief, Appellate Division
Kathleen M. Salyer
Assistant United States Attorney
Richard Hong
Assistant United States Attorney

Of Counsel

**UNITED STATES' MOTION TO STRIKE NEW
ISSUE RAISED IN APPELLANT'S REPLY BRIEF**

Appellee, the United States of America, by and through its undersigned counsel, respectfully requests that this Court strike new arguments under *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531 (2004), raised for the first time in appellant Martin G. Chambers' reply brief. In support of its motion, the United States avers the following:

1. Chambers filed his opening brief in the above-captioned case in April 2004, in which he raised the following issues:

- I. "Whether Federal Rules of Evidence §§ 702 and 704(b) are violated by the 'expert' testimony of a law enforcement officer opining as to appellant's knowledge, with-out foundation, the one critical element in this case?"
- II. "Whether Chambers was denied due process of law by the illegal action of the United States law enforcement officials assisting Canadian law enforcement officials to violate Canadian law in order to prosecute and convict a Canadian citizen in the United States?"
- III. "Whether the district court committed error by refusing to consider a downward departure based upon substantial and extraordinary characteristics of Mr. Chambers?"

- IV. "Whether the evidence to convict under Title 18 U.S.C. § 1956(a)(3)(B) which requires that a law enforcement officer represent to the defendant that the funds to be laundered are from cocaine activity, is insufficient as a matter of law under circumstances in which the law enforcement official gave contradictory statements concerning the source of the money, and only sarcastically referred to it as cocaine money."

(Chambers' Opening Brief).

2. The United States filed its responsive brief in June 2004, and addressed the issue raised in Chambers' opening brief.

3. Before filing Chambers' reply brief, his counsel, Donald Ré, Esq. contacted the undersigned counsel and asked whether the government objected to his request for an enlargement of time to file Chambers' reply brief in this case. At that time, the undersigned counsel advised Mr. Ré that the government did not object to any enlargement of time request, but did object to Chambers' interest in raising in the reply brief issues relating to the Supreme Court's June 24, 2004, decision in *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531 (2004). The undersigned also advised Mr. Ré that the United States would move to strike any portions of his reply brief that addressed *Blakely* because he had not raised arguments arguably related to *Blakely* in Chambers' opening brief.

4. In *Blakely*, the Supreme Court held that a Washington state sentencing scheme deprived the defendant of his constitutional right to have a jury determine beyond a

reasonable doubt all facts legally essential to his sentence.

5. In *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), this Court noted that “[p]arties must submit all issues on appeal in their initial briefs” in accordance with *Fed. R. App. P.* 28(a)(5) and 11th Cir. R 28-1(h). It further explained that “[w]hen new authority arises after a brief is filed, this circuit permits parties to submit supplemental authority on ‘intervening decisions or new developments’ regarding issues already properly raised in the initial briefs.” *Id.* However, an appellant abandons issues or arguments not raised in his initial brief. *Id.* (citing *United States v. DeMasi*, 40 F.3d 1306, 1318 n.12 (1st Cir. 1994) (issue raised for first time in reply brief waived)). Similarly, in *United States v. Coy*, 19 F.3d 629, 632 n.7 (11th Cir. 1994), this Court held that “[a]rguments raised for the first time in a reply brief are not properly before a reviewing court.” See also *United States v. Oakley*, 744 F.2d 1553, 1556 (11th Cir. 1984) (same); *United States v. Benz*, 740 F.2d 903, 916 (11th Cir. 1984) (same).

6. The *Blakely* issues Chambers now raises for the first time in his reply brief (Section V of his reply brief, pp. 26-31) are completely new and unrelated to the sentencing issue raised in his opening brief. Chambers now claims that *Blakely* required that the jury, not the judge, determine, using a beyond a reasonable doubt standard, a number of enhancements applied against Chambers at sentencing.

7. Because Chambers is raising new arguments under *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531 (2004), for the first time in his reply brief, that portion of the reply brief containing the new issue should be stricken. See *Nealy*, 232 F.3d at 830; see also *Oakley*, 744 F.2d at 1556; *Benz*, 740 F.2d at 916.

CONCLUSION

Wherefore, the United States respectfully requests that this Court strike those portions of Chambers' reply brief that raise new arguments under *Blakely*, specifically those raised throughout pp. 26-31.

Respectfully submitted,

Marcos Daniel Jiménez
United States Attorney

By: /s/ Richard Hong
Richard Hong
Assistant United States Attorney

Anne R. Schultz
Chief, Appellate Division

Kathleen M. Salyer
Assistant United States Attorney

Of Counsel

(Certificate of Service and Certificate of Interested Persons
have been omitted.)

NO. 03-16469-BB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 9, 2004
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Appellee,

- versus -

MARTIN G. CHAMBERS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

**MARTIN CHAMBERS' OPPOSITION TO
UNITED STATES' MOTION TO STRIKE NEW
ISSUE RAISED IN APPELLANT'S REPLY BRIEF**

The government has filed, on May 4, 2004, a motion to strike an argument by appellant regarding the applicability of *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 253 [sic] (2004) to this case. Appellant objects to and opposes striking this issue. This objection is based upon the following:

1. Martin Chambers filed an Opening Brief with this court in April 2004.

2. The United States Supreme Court, on June 24, 2004, decided *Blakely v. Washington*, __ U.S. ___, 124 S.Ct. 253 [sic] (2004). That case, as is explained in arguments contained in the Appellant's Reply Brief, renders the sentencing of appellant Martin Chambers as it occurred in this case. unconstitutional. In *Blakely*, the court applied the principles of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), to a Washington State sentencing scheme which is very similar to the United States Sentencing Guidelines. The *Blakely* decision extended the rule of *Apprendi* beyond the limits previously understood by most courts to have considered the issue, and clearly beyond its application as decided by this court.

3. The Eleventh Circuit, *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) specifically held that *Apprendi* only applied to sentencing facts "that increased the penalty for a crime beyond the prescribed statutory maximum." 269 F.3d at 1268. *Sanchez* made it abundantly clear that, in the Eleventh Circuit, *Apprendi* was inapplicable so long as the ultimate sentence imposed upon a defendant was at or below the statutory maximum. Under *Sanchez*, there is *no question* that *Apprendi* could not be applied to this case.

4. *Blakely* clearly established a new rule of constitutional law which is *required* by the Supreme Court to be applied to "cases pending on direct review". See *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *United States v. Sanchez*, *supra*, 269 F.3d at 1268, n.35.

5. On or about July 2, 2004, Chambers sought leave of court to file a supplemental Opening Brief to discuss the applicability of *Blakely* to this case. The government opposed that request. To date, no ruling has been made upon it.

6. The government in its present motion relies on a series of cases in this Circuit which, it says, precludes consideration of any issue not raised in the opening brief. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

7. The application of this rule to the present appeal is unconstitutional, and violates Chambers' rights in the following regards:

a. Chambers would be denied his Sixth Amendment right to a jury trial, as required by *Blakely*, with regard to those facts, relied upon by the district court, in enhancing his sentence, as is explained in the Appellant's Reply Brief;

b. Chambers would be denied equal protection of the law, because, unlike an appellant identically situated to him, whose opening brief was scheduled to be filed following the *Blakely* decision, he would be deprived of the substantial benefits of *Blakely*, simply because his brief was filed earlier than the *Blakely* decision;

c. Chambers would be denied due process of law because this court has previously determined that *Apprendi* did not apply in the manner described in *Blakely*, and, to raise this issue, Chambers would have had to have raised an issue considered frivolous in this court.

d. Failure to apply *Blakely* would deny Chambers due process because to do so would conflict with previous statements of this court.¹ *Sanchez*, which explained the limits of the *Apprendi* decision in this Circuit, recognized, at footnote 35, the retroactive application of new constitutional principles, even when not previously raised;

e. Chambers would be denied due process because the court, in applying a notion of "waiver" under these circumstances would deprive Chambers of a valuable constitutional right, despite the fact that there has been no "waiver", no voluntary relinquishment of a "known right". In fact, in this Circuit, *Apprendi* was not a "known right" but was known to not be a right.

8. This court, apparently standing alone [see *United States v. Ardley*, 273 F.3d 991, 996 (Tjopflat, Circuit Judge, dissenting from the denial of a petition for rehearing *en banc*)] deprives criminal defendants on appeal of the mandatory retroactive application of recent Supreme Court constitutional decision, based on a theory of "abandonment". The application of the abandonment principle not only does an injustice to the retroactivity requirements of *Griffith*, but is particularly abhorrent in a situation such as this, in which this court has specifically indicated, in *Sanchez*, that the issue that it now seemingly requires to have been raised was without merit.

¹ See *United States v. Diaz*, 248 F.3d 1065, 1104 (11th Cir. 2001); *United States v. Thomas*, 242 F.3d 1028, 1034 (11th Cir. 2001); *United States v. Audain*, 254 F.3d 1286, 1288-89 (11th Cir. 2001); *United States v. Gerrow*, 232 F.3d 831, 833 (11th Cir. 2001); *United States v. Walker*, 228 F.3d 1276, 1278 n.1 (11th Cir. 2000); *United States v. Candelario*, 240 F.3d 1300, 1311 (11th Cir. 2001). But see *United States v. Levy*, ___ F.3d ___, No. 01-17133 (11th Cir. August 3, 2004) (on Petition for Rehearing).

9. Nor does abandonment satisfy the constitutional requirement of waiver of a constitutional right. Under *Johnson v. Zerbst*, 304 U.S. 458 (1938) such a right can *only* be waived if there is finding of a voluntary and intentional waiver of a "known right". It is inconceivable that one could conclude that the application of *Apprendi* to this case could be determined a "known right" when, under *Sanchez*, an appellant in this Circuit (and indeed in every other Circuit) was deprived of that right.

10. The application of the abandonment rule would create a conflict not only with decisions of other Circuits (see *Ardley*, *supra*, Tjoflat dissenting from denial of Petition for Rehearing *en banc*) but with this Circuit. See footnote 1 above.

11. As a result, the application of the "abandonment" rule would deprive Chambers of his rights to due process, equal protection of the laws, and jury trial, in violation of the Fifth and Sixth Amendments to the United States Constitution.

CONCLUSION

Martin Chambers respectfully requests that this court *grant* his previously filed motion to file a supplemental brief regarding *Blakely v. Washington*, *supra*, and *deny* the government's motion to strike the argument concerning *Blakely* from the brief previously submitted to this court.

DATED: August 6, 2004

Respectfully submitted,

DONALD M. RÉ
A Professional Law Corporation

/s/ DONALD M. RÉ
DONALD M. RÉ
Attorney for Appellant
MARTIN G. CHAMBERS

(Certificate of Service and Certificate of Interested Persons
have been omitted.)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16469-BB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 02, 2004
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN G. CHAMBERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Appellant's motion for leave to supplement his brief in light of the Supreme Court's Recent Decision in *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531 (2004)" is DENIED. See *U.S. v. Hembree*, No. 03-16001, 2004 WL 1873773 (11th Cir. August 23, 2004); *U.S. v. Curtis*, 2004 WL 1774785

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(11th Cir. August 10, 2004); *U.S. v. Levy*, 2004 WL 1725406
(11th Cir. August 3, 2004).

Appellee's "Motion to Strike New Issue Raise in
Appellant's Reply Brief" is GRANTED to the extent that this
Court will disregard any issue raised pursuant to *Blakely* in
Appellant's reply brief.

/s/ WM. H. PRYOR
UNITED STATES CIRCUIT JUDGE

H-1

NO. 03-16469-BB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 14, 2005
THOMAS K. KAHN
CLERK

UNITED STATES OF AMERICA,

Appellee,

- versus -

MARTIN G. CHAMBERS,

Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**

**MOTION FOR REMAND FOR
RE-SENTENCING PURSUANT TO
United States v. Booker,
543 U.S. ___, 125 S.Ct. 738 (2005)**

COMES NOW the appellant Martin Chambers who seeks an order of this court remanding this matter for resentencing under the provisions of *United States v. Booker*, 543 U.S. ___, 125 S.Ct. 738 (2005).

This motion is made upon the following grounds:

1. Chambers was sentenced in the United States District Court for the Southern District of Florida, the Honorable Ursula Ungaro-Benages, presiding, on December 5, 2003. At that time, Chambers was sentenced to a term of incarceration of 188 months, the *bottom* of guideline level 36.¹

2. Chambers filed his Appellant's Opening Brief with this court on or about April 13, 2004.

3. Chambers was determined to have a final offense level 36. This included two points for role under U.S.S.G. §3B1.1(c); two points for obstruction of justice under U.S.S.G. §3C1.1; and two points for sophisticated laundering under U.S.S.G. §2S1.1(b)(3). In addition, although the amount of laundered funds was contained in the indictment, the jury made no finding, and was directed to make no finding regarding the exact amount of laundered funds. However, an additional 14 points under U.S.S.G. §2B1.1 were added. All these calculations were made by the district court, at the time of sentence, by a preponderance of the evidence.

¹ The calculations made by the district court were as follows:

1. Base offense level §2S1.1(a)(2) [including the value of the laundered funds as \$700,000]	22
2. Knowledge that the laundered funds were proceeds of drugs, §2S1.1(b)(1) and (a)(2)	+6
3. Conviction under 18 U.S.C. §1956, §2S1.1(b)(2)(B)	+2
4. Sophisticated laundering pursuant to U.S.C. §1.1(b)(3)	+2
5. Role in the offense, §3B1.1(c)	+2
6. Adjustment for obstruction of justice, §3C1.1	+2

4. The United States Supreme Court decided *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004) on June 24, 2004. *Blakely* applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to enhancements to a sentence based upon facts not considered or found by a jury. For the court, the critical fact was that a judge may impose a sentence "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

5. In response to *Blakely*, appellant filed with this court on July 2, 2004, a "Motion for Leave to Supplement Appellant's Opening Brief Under *Blakely v. Washington*".

6. The government opposed the filing of this brief by a pleading filed on or about July 19, 2004.

7. No ruling having been issued by the court regarding this motion, appellant filed his reply brief on July 22, 2004, and argued, in that reply brief, as Argument V that "The appellant must be re-sentenced because substantial upward adjustments were found against him in violation of *Blakely v. Washington*, 2004 W.L. 1402697 (June 24, 2004)".

8. The United States moved by motion filed August 2, 2004, to strike this argument from the reply brief. Chambers opposed the motion to strike in a pleading filed August 9, 2004. In that pleading, appellant noted that this Circuit in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) had specifically held that *Apprendi* only applied to sentencing facts "that increase the penalty for a crime beyond the prescribed statutory maximum.."

9. Appellant further noted in that filing that *Blakely* established a new rule of constitutional law which is required by the Supreme Court to be applied "to cases pending on

direct review". See *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987).

10. By order of September 2, 2004, this court denied the motion for leave to supplement the brief to raise issues concerning *Blakely v. Washington*, *supra*, and granted the government's motion to strike this argument from the Appellant's Reply Brief. The case was argued before this court on March 3, 2005.

11. On January 12, 2005, the United States Supreme Court decided *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005). In *Booker*, the court found no constitutionally significant difference between the federal guideline system and the system found unconstitutional in *Blakely*. In a majority opinion authored by Justice Stevens, the court concluded that the guidelines, as written, improperly permitted sentencing ranges to be adjusted upward by facts not considered by a jury, nor found beyond a reasonable doubt. A second majority opinion by Justice Breyer concluded that the constitutional defect of the guidelines was in their mandatory application, and found the guidelines to be advisory only.

12. The *Booker* court recognized that "we must apply today's holding – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." 125 S. Ct. at 769. With regard to cases now on appeal, the court concluded that a "plain error" standard of review was to be applied. *Id.*

13. The standards for plain error are that there be: "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Cotton*, 535 U.S. 625, 631 (2002).

14. This court, in *United States v. Rodriguez*, ___ F.3d ___, No. 04-12676 (11th Cir. February 4, 2005) recognized that, in cases such as this, the "first prong of the plain error test is satisfied" because the appellant's "sentence was enhanced as a result of findings made by the judge that went beyond the facts admitted by the defendant or found by jury."

15. This court also recognized in *Rodriguez*, that the "second prong" of the plain error test is also met because, after *Booker* "the error is now plain".

16. This court has adopted in *Rodriguez*, however, a formulation of the "affects substantial rights" portion of the plain error test which is improper, and is at odds with decisions of other Circuits which have ruled on this issue.

17. Specifically, this court has concluded that the error is not the finding of extra verdict enhancements, but rather only in the "mandatory nature of the guidelines once the guideline range has been determined". See also *United States v. Duncan*, ___ F.3d ___, No. 03-15315 (11th Cir., February 24, 2005).

18. This formulation of the plain error test is erroneous for the following reasons:

a. It is clear, to paraphrase the decision of the Ninth Circuit in *United States v. Ameline*, ___ F.3d ___, No. 02-30326 (9th Cir., February 9, 2005):

"There can be little doubt that the constitutional error in sentencing [appellant] affected [appellant's] substantial rights. [Appellant] was deprived of his right to have a jury find beyond a reasonable doubt [the existence of

the enhancing facts].”

b. This court has recognized, in *Duncan*, that decisions in the Fourth, Sixth and Ninth Circuits find plain error under the circumstances described in this case. See *United States v. Ameline*, *supra*; *United States v. Oliver*, __ F.3d __, 2005 W.L. 233779 (6th Cir. February 2, 2005); *United States v. Hughes*, __ F.3d __, 2005 W.L. 147059 (4th Cir. January 24, 2005).

c. Even though [sic] the guidelines are now advisory only, it is submitted that after *Booker* each of the enhancements must still be proved beyond a reasonable doubt or be admitted by the defendant. Thus, although advisory, the advice given to the district court by the guidelines is unconstitutional and fatally flawed, because the advisory range has been established in an unconstitutional manner. Regardless of the formation of the third prong of the plain error test, the substantial rights of Chambers have been affected by the improper calculations of substantial enhancements which have had an overwhelming affect on his sentence.

d. The formulation adopted by this Circuit has unconstitutionally deprived appellants of their right to the application of *Booker* as explained in *Booker* and *Blakely*. The court has, in effect, established a hurdle to application of these cases for appellants on direct appeal which, under the court's analysis, would effectively, and unconstitutionally, withdraw the salutary effect of the decision to appellants such as Chambers.

e. Violation of the *Booker* decision, which imposes a substantive charge, constitutes structural error that excuses a harmless error analysis. See *Arizona v. Fulminate*, 499 U.S. 279 (1991).

f. In this case, the record substantiates the notion that the district court would have entered a lesser sentence, had it been available.

(i) First, the district court followed recommendations of the probation report to the letter. That report, as noted by the district court requested a sentencing range of 188-235 months, which was found by the district court. Transcript December 5, 2003, page 9.

(ii) Despite the fact that the government urged a sentence of 200 months, the court sentenced Chambers to the low end of the guideline range. In doing so, the court noted the defendant's age. Thus, unlike a situation in which a defendant is sentenced to the mid or upper portion of a range, the court here selected the *lowest* sentence available to it, after acceptance of each of the guideline characteristics suggested by the PSIR.

19. Appellant Martin Chambers is incarcerated pursuant to the sentence of the district court.

20. Based upon the foregoing, the defendant respectfully suggests that he is entitled to a re-sentencing before the district court at which the principles of *United States v. Booker*, *supra*, will be followed.

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DATED: March 10, 2005

Respectfully submitted,

DONALD M. RÉ
A Professional Law Corporation

/s/ DONALD M. RÉ
DONALD M. RÉ
Attorney for Appellant
MARTIN G. CHAMBERS

(Certificate of Service and Certificate of Interested Persons
have been omitted.)

**PETITION FOR REHEARING;
SUGGESTION FOR REHEARING *EN BANC***

ARGUMENT (Pages 4-9)

- I. IT IS APPROPRIATE TO HAVE AN EN BANC REVIEW OF THIS COURT'S POLICY OF REFUSING TO CONSIDER ISSUES NOT RAISED IN THE OPENING BRIEF, BECAUSE UNDER THE CIRCUMSTANCES OF THIS CASE, THE APPLICATION OF THAT RULE DENIES CHAMBERS AND MANY OTHER CRIMINAL APPELLANTS SIMILARLY SITUATED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS**

Chambers timely filed his Opening Brief in this case on or about April 13, 2004. In that brief, he argued that the court improperly denied a downward departure based upon a number of personal characteristics of the defendant, the district court having concluded:

"Well, you know, the guidelines don't ask us to look at whether or not the person is outside the heartland of the guidelines; and that is one of the problems with the guidelines, which is that the more complex the individual is who is before the court, the less adequate the guidelines are to address what the appropriate punishment might be." TR 12-5-2003, page 93, lines 18-24; AOB, page 45.

Approximately two months later, on June 24, 2004, the United States Supreme Court decided *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 253 (2004).

One week later, Chambers sought leave to supplement his original brief, or to file a new brief on this issue. Because the motion had not been ruled upon by the time of the filing of the Reply Brief, on or about July 22, 2004, the issue was included as an argument in that brief.

Subsequently, the court struck this portion of the brief.

Following the Supreme Court's decision in *United States v. Booker*, 543 U.S. ____ (2005) on January 12, 2005, Chambers filed additional motions for supplemental briefing. The panel opinion rejected these motions in footnote 3 based upon this court's rule that it will not consider issues which were not raised in the initial brief.

This "initial brief" rule appears never to have been subjected to *en banc* review, although it has been the topic of discussion and disagreement in cases in which *en banc* review was denied.

For example, in *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001) on denial of *en banc*, previous opinion 242 F.3d 989 (11th Cir. 2001) the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was raised in a Petition for Rehearing which was denied. The matter was vacated and remanded by the United States Supreme Court, leading to a reinstatement of the earlier decision in *United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001). A suggestion for rehearing *en banc* was then denied. *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001). Four judges concurred in the denial [Judges Carnes, Black, Hull and Marcus], while two dissented (Judges

Tjoflat and Barkett).

Similarly in *United States v. Ford*, 270 F.3d 1346 (11th Cir. 2001) *Apprendi* was raised in a Petition for Rehearing which was denied. The Supreme Court vacated and remanded. The original result was reinstated pursuant to the initial brief rule.

The *Apprendi* issues were put to rest by this court, finally, in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001), which found *Apprendi* inapplicable to sentencing guidelines.

A similar fate has befallen defendants attempting to raise *Blakely*.

In *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) on denial of *en banc*, previous opinion 379 F.3d 1241 (11th Cir. 2004), *Blakely* was raised in a Petition for Rehearing. The matter was vacated and remanded by the Supreme Court, and the original decision was reinstated. On this occasion, the denial of the *en banc* suggestion led again to four concurring judges [Judges Carnes, Hull, Anderson and Pryor], and two dissenters [Judges Tjoflat and Wilson]. Similar results have occurred in other cases, including *United States v. Pipkins*, 278 F.3d 1281 (11th Cir. 2004), reinstated ___ F.3d ___, No. 02-14306 (11th Cir., June 20, 2005).

Application of this rule to individuals such as Chambers raises serious due process and equal protection concerns.

Many of these issues are discussed at length by Judge Tjoflat in his dissents from denial of *en banc* review in the above cases. Because of page limitations, they obviously cannot be belabored here. It is Chambers' position, as expressed in his previous filings with this court, however, that

it is the intention of the Supreme Court to make *Booker* applicable to all cases now on appeal. It is particularly abhorrent that Chambers may be suffering under an illegal sentence which, because of its length [188 months] and his age [64] may well be a life sentence. He has been denied a substantive constitutional protection by the application of a procedural rule. He, like others similarly situated, is therefore deprived of due process.

The equal protection claims are equally compelling. In terms of the right to have this issue heard, how is Chambers rationally differentiated from an identical litigant whose opening brief was filed approximately 70 days later, and thus could have included *Blakely*, and taken advantage of *Booker*? There is no rational distinction between these individuals. There is only the luck of timing.

Therefore, with regard to similarly situated litigants within the Eleventh Circuit, he is denied equal protection of the law.

But it is also true that, compared to similar litigants in other jurisdictions, he is being treated substantially differently, for no rational reason. As noted by Judge Tjoflat in his dissent from denial of *en banc* in *United States v. Levy, supra*, 391 F.3d 1327, 1340:

"This continues to be the only Circuit in which 'cases are entitled to the benefit of the intervening decision *only* if: (1) the case was not yet final at the time of the intervening decision; *and* (2) the litigant presaged the intervening decision by raising the issue addressed by that decision in the litigant's brief on appeal.'" (Emphasis in original).

Particularly in view of the concerns expressed by the district court judge in this case regarding the inadequacy of the guidelines to take into account personal characteristics, the due process and equal protection issues here argue strongly in favor of a modification of the initial brief rule. The issue is particularly compelling here because this court like every other Circuit, had concluded that *Apprendi* did not apply to the guidelines.

Chambers' predicament, therefore, arises because of a lack of prescience and the serendipity of timing. The quality of criminal justice should hardly hang on such thin threads.

For these reasons, it is suggested that it is appropriate for the court to consider the applicability of the initial brief rule in cases in which retroactive application of a new rule has been ordained, and, particularly, where the Circuit has previously unequivocally rejected the issue.

* * * *